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October 24, 2002

**VIA ELECTRONIC FILING**

Marlene Dortch, Secretary  
Federal Communications Commission  
445 12th Street, S.W.  
Washington, DC 20554

Re: Application by SBC Communications, Inc. For Authorization Under  
Section 271 of the Communications Act to Provide In-Region, InterLATA  
Service in the State of California - WC Docket No. 02-306 - Ex Parte

Dear Ms. Dortch:

On Wednesday, October 23, 2002, Ruben Garcia, President & CEO of Telscape Communications, Inc. ("Telscape"), Jeff Compton, Director of Carrier Relations, Telscape, along with Danny Adams and Ross Buntrock, Kelley Drye & Warren LLP, Counsel to Telscape, met with Renee Crittendon, John Stanley, Daniel Shiman, Pamela Arluk, Brad Koerner, Jack Yachbes, and Rhonda Lien, of the Wireline Competition Bureau's Competition Policy Division; Katie Rangos, of the WCB's Industry Analysis & Technology Division; Gary Schonman and Connie Hellmer of the Enforcement Bureau's Investigations & Hearings Division; and Terry Reideler, of the International Bureau's Satellite Division to address issues as they relate to SBC's failure to comply with Checklist Item 2 (inaccurate wholesale bills) and Checklist Item 5 (failure to provide shared transport for intraLATA toll calls), as well as SBC's failure to satisfy the public interest test of Section 271(d)(3). The materials left with the staff members, along with a copy of SBC's "win-back" letter, are enclosed herewith.

KELLEY DRYE & WARREN LLP

Marlene Dortch, Secretary  
October 24, 2002  
Page Two

In accordance with Section 1.1206 of the Commission's rules, an original and one copy of this letter and attachment is being filed with your office.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Ross A. Buntrock". The signature is fluid and cursive, with the first name "Ross" being particularly prominent.

Ross A. Buntrock

cc: Renee R. Crittendon  
John Stanley  
Gary Schonman  
Connie Hellmer  
Katie Rangos  
Daniel Shiman  
Pamela Arluk  
Brad Koerner  
Jack Yachbes  
Rhonda Lieu  
Terry Reideler

**APPLICATION OF SBC COMMUNICATIONS, INC.  
FOR 271 AUTHORITY IN CALIFORNIA**

**FCC DOCKET WC No. 02-306**



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**TELSCAPE COMMUNICATIONS, INC.**

**MEETING WITH FEDERAL COMMUNICATIONS COMMISSION**

**OCTOBER 23, 2002**

**Ruben Garcia, President and CEO, Telscape**

**Jeff Compton, Director, Carrier Relations, Telscape**

**Danny Adams, Kelley Drye & Warren LLP, Counsel to Telscape**

**Ross A. Buntrock, Kelley Drye & Warren LLP, Counsel to Telscape**



# Agenda

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- **Introductions/Overview of Telscape Communications**
- **Telscape Specific 271 Issues**
  - Billing - PacBell has failed to provide accurate wholesale bills, and resolve billing disputes in violation of Checklist Item 2.
  - UNE Elements - SBC has failed to provide shared transport for intraLATA toll calls in violation of Checklist Item 5.
  - Anti-Competitive Actions - PacBell has failed to demonstrate that grant of application is in public interest, as required by Section 271(d)(3)
    - SBC's anti-competitive win-back campaign.
- **The California Commission Decision Does Not Support Grant of the Application**
- **Conclusion/Questions**

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## **Telscape At-A-Glance**

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- **The company was formerly a subsidiary of Telscape International, Inc., which filed Chapter 11 in April 2001.**
- **TSG Capital and Management purchased the Los Angeles and San Diego CLEC assets out of bankruptcy in October 2001.**
- **Telscape is a facilities-based CLEC focused on the US Hispanic market.**
- **Telscape has about 50,000 customers in California.**
- **SBC invoices represent about 40% of Telscape's total monthly expenses.**



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## **Key Operating Statistics**

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- **Telscape has installed and maintains two Class 5 Nortel DMS central offices.**
- **The company has 36 ILEC collocations which give it access to 4.5 million people of which 3.2 million are Hispanic.**
- **Telscape has a back office system based on a Kenan Arbor BP platform.**



## **Key Operating Statistics (cont'd)**

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- **The company had \$3.2 million in revenue in August 2002.**
- **Telscape currently has about 50,000 customers of which 71% are ULTS eligible making the company the 3rd largest recipient of ULTS funding.**
- **99.2% of Telscape customers are single-line residential telephone service.**
- **The company has 270 employees.**



## **PacBell Has Failed To Provide Accurate Wholesale Bills & Resolve Billing Disputes In Violation Of Checklist Item 2**

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- Non-discriminatory access to network elements under Checklist Item 2 includes the requirement that RBOC demonstrates that it can produce readable, auditable and accurate wholesale bills. *See Verizon Pennsylvania Order*, Memorandum Opinion and Order 16 FCC Rcd 17419, ¶¶ 22-23 (2001).
- Telscape has found billing errors every month that we have done business with SBC.
- Disputes have taken between 6 and 14 months to resolve.
- System defects and human intervention have caused over-billing by 9% to 118%.





## **PacBell Has Failed To Provide Accurate Wholesale Bills & Resolve Billing Disputes In Violation Of Checklist Item 2 (cont'd)**

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- SBC has demanded payment for all bills during the dispute period, even as they continued to send bills which they knew were overstated because of their billing system defects.
- UNE-P Deaveraged Loop Costing
  - When Telscape initiated UNE-P, SBC charged Telscape “averaged” loop rates contrary to Telscape’s interconnection agreement guidelines.
  - Telscape consistently disputed the charges, but only after much delay and SBC confusion, the problem was corroborated; however, it was several more months until the credit was finally given.



## PacBell Has Failed To Provide Accurate Wholesale Bills & Resolve Billing Disputes In Violation Of Checklist Item 2 (cont'd)

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- Port-Back Billing
  - SBC had a policy to unilaterally submit port-back orders for end-users returning to SBC and charging Telscape for the disconnect at the fully manual rate instead of the mechanized rate which the orders were eligible to receive.
  - Telscape raised the issue in the SBC CLEC user forum at which time SBC finally decided to reverse their policy.
  - SBC promised they would automatically credit all CLECs for the amount they were aggrieved, but in the final release of the documentation they changed the verbiage to credit only the CLECs that were able to quantify the amount.



## **PacBell Has Failed To Provide Accurate Wholesale Bills & Resolve Billing Disputes In Violation Of Checklist Item 2 (cont'd)**

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- SBC ULTS End-User Migrations to Telscape
  - SBC was using the Telscape wholesale order as a retail flag to check to see if the SBC end-user submitted their written ULTS certification. If the end-user had not completed the form, SBC would re-rate the customer at the higher rate and back-bill them.
  - At the same time, SBC was charging Telscape for a semi-mechanized rate for manually handling the order.
  - After Telscape brought the practice to light in the CLEC User Forums, SBC agreed to change their practice and credit Telscape for any past occurrences.



## **PacBell Has Failed To Provide Accurate Wholesale Bills & Resolve Billing Disputes In Violation Of Checklist Item 2 (cont'd)**

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- CABS – Carrier Access Billing Specification
  - SBC disputed all of Telscape's CABS billing.
  - During the dispute resolution process, SBC tried to "trick" Telscape into charging a lower rate than was required.



## **PacBell Has Failed To Provide Accurate Wholesale Bills & Resolve Billing Disputes In Violation Of Checklist Item 2 (cont'd)**

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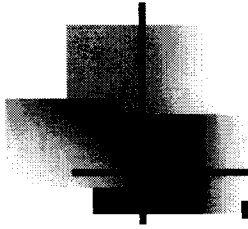
- Late Charges
  - SBC continues to bill Telscape for frivolous late charges, and Telscape has repeatedly asked SBC to remove the late charges as they are not proper.
  - Not only does SBC refuse to address the issue, but SBC continues also to allow the late charges to accrue and applies new late charges on the unpaid late charges.



## **SBC Has Failed to Provide Shared Transport For IntraLATA Toll Calls In Violation of Checklist Item 5**

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- Transport (dedicated or shared) is an unbundled network element that must be provided on a nondiscriminatory basis pursuant to Section 251(c)(3). *See* 47 U.S.C. §271(c)(2)(B)(ii) and (v).
- The RBOC must demonstrate that it provides transport to a competing carrier under terms and conditions that are equal to the terms and conditions under which the incumbent LEC provisions such elements to itself. *Local Competition First Report and Order* at ¶315; *see also* 47 C.F.R. §51.313(b)



## **SBC Has Failed to Provide Shared Transport For IntraLATA Toll Calls In Violation of Checklist Item 5 (cont'd)**

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- In violation of Checklist Item 5, SBC has consistently refused to facilitate Telscape's request to carry UNE-P intraLATA toll calls using shared transport.
- On October 9, 2002, the FCC issued NAL against SBC, finding that it has failed to offer shared transport in violation of the *SBC/Ameritech Merger Order* and issued NAL for a forfeiture of \$6,000,000.
- In an October 17, 2002 Addressable Letter to CLECs, SBC provided notice of a "new product," intraLATA toll arrangement for UNE-P.
  - SBC stated that the Addressable Letter was effective October 15<sup>th</sup>, however, product still cannot be ordered and SBC requires CLECs to execute amendment to interconnection agreement.



## **PacBell Has Failed to Demonstrate That Grant of Application is in Public Interest as Required by Section 271(d)(3)**

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- **Anti-Competitive Win-Back Efforts**
  - SBC is aggressively targeting Telscape's newly-acquired customers for SBC win-backs, often quicker than Telscape is able to act when SBC retail takes a customer from Telscape.
  - SBC sends direct mail to Telscape customers suggesting they may have been slammed.
  
- **Transfer of Customers in Service Suspended Status (SNP)**
  - When Telscape has a UNE-P or Resale customer that is in SNP status, SBC takes the customer back in a win-back situation. However, SBC refuses to allow Telscape to migrate SBC customers that are in the same SNP status.





## **PacBell Has Failed to Demonstrate That Grant of Application is in Public Interest as Required by Section 271(d)(3) (cont'd)**

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- **Disparaging Remarks to Customers**
  - Telscape call center employees are repeatedly told that SBC call center employees make disparaging comments about Telscape, including business operations and business stability.
  
- **SBC Makes Baseless Allegations of Slamming Against Telscape**
  - Approximately 20 per day
  - 99% prove to be erroneous
  - By contrast, Telscape receives no such allegations from other ILECs.



## **The California Commission Decision Does Not Support Grant of the Application**

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- CPUC found PacBell in violation of Checklist Items 11 and 14.
- CPUC found that PacBell's application was not in the public interest and failed to satisfy Section 709.2 of the State Telecommunications Act.

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October 18, 2002

**VIA ELECTRONIC FILING**

Ms. Marlene Dortch, Secretary  
Federal Communications Commission  
445 12<sup>th</sup> Street, N.W.  
Washington, D.C. 20554

**Re: Application by SBC Communications Inc. For Authorization Under  
Section 271 of the Communications Act to Provide In-Region,  
InterLATA Service in the State of California;  
WC Docket No. 02-306**

**Written *Ex Parte* Presentation by Telscape Communications, Inc.**

Dear Ms. Dortch:

Pursuant to Section 1.1206(b)(1) of the Commission's Rules, Telscape Communications, Inc. ("Telscape") submits this written *ex parte* presentation in the above-captioned docketed proceeding. The purpose of this presentation is to provide information in advance of an oral *ex parte* presentation to be made to the SBC/California 271 review team on October 23, 2002.

**Introduction**

Telscape is a Monrovia, California facilities-based competitive local exchange carrier ("CLEC") that offers bundled packages of local, long distance, and enhanced services to residential and small business customers in Southern California. Telscape provides service to its end-users utilizing unbundled local loops ("UNE-L"), the unbundled network element platform ("UNE-P") as well as a negligible number of resale lines. To date, Telscape has built out collocations in 36 ILEC central offices, providing it access to an addressable market of almost 5 million people. Today, Telscape provides service to approximately 50,000 customers. Herein, Telscape describes the problems that it has continued to have in attempting to compete in the

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California competitive telecommunications market, and accordingly, how these on-going and pervasive problems preclude a finding by the Commission that Pacific Bell ("Pacific Bell" or "SBC") has satisfied the requirements of the Section 271 checklist.

Indeed, the California Public Utility Commission ("CPUC") itself concluded in Decision 02-09-050 ("D.02-09-050") that Pacific Bell had satisfied only 12 of the 14 Section 271 checklist items, and stated that even those items with which Pacific Bell had complied, were adequate "in only the most technical sense."<sup>1</sup> As the Commission is obviously aware, the CPUC concluded that Pacific Bell had failed to comply with checklist items 11 and 14. Below, Telscape describes in detail how Pacific Bell has also failed comply with checklist items 2 and 5 of the Section 271 checklist, in addition to failing to satisfy the public interest test of Section 271(d)(3).

**PacBell Has Failed to Provide Telscape With Accurate Wholesale Bills in Violation of Checklist Item 2**

Checklist Item 2 requires that Pacific Bell provide non-discriminatory access to network elements in accordance with section 251(c)(3) and 252(d)(1). In the *Verizon Pennsylvania Order* the Commission concluded that nondiscriminatory access to network elements under checklist Item 2 includes the requirement that a BOC demonstrate that it can produce readable, auditable and accurate wholesale bills.<sup>2</sup> The Commission held:

Inaccurate or untimely wholesale bills can impede a competitive LEC's ability to compete in many ways. First, a competitive LEC must spend additional monetary and personnel resources reconciling bills and pursuing bill corrections. Second, a competitive LEC must show improper overcharges as current debts on its balance sheet until the charges are resolved, which can jeopardize its ability to attract investment capital. Third, competitive LECs must operate with a diminished capacity to monitor, predict and adjust expenses and prices in response to competition. Fourth, competitive LECs may lose revenue because they generally cannot, as a practical matter, back-bill end users in response to an untimely wholesale bill from an incumbent LEC.

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<sup>1</sup> See *Rulemaking on the Commission's Own Motion to Govern Open Access to Bottleneck Services and Establish a Framework for Network Architecture Development of Dominant Carrier Networks*, R 93-04-003, D.02-09-050 at 252 (Sept. 25, 2002) at 252 ("California Decision").

<sup>2</sup> See *Verizon Pennsylvania Order*, Memorandum Opinion and Order, 16 FCC Rcd 17419, ¶22-23 (2001). ("Verizon Pennsylvania Order").

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Accurate and timely wholesale bills in both retail and BOS BDT format thus represent a crucial component of OSS.<sup>3</sup>

In fact, Telscape has experienced all of the problems identified by the Commission in the *Verizon Pennsylvania Order*. Pacific Bell's inaccurate bills have cost Telscape hundreds of thousands of dollars in personnel resources. Indeed, Telscape has hired a full-time bill auditor to audit SBC's bills (both electronic and paper) and Telscape spends hours each week on the telephone with SBC on weekly billing conference calls. Telscape has found billing errors each and every month that Telscape has done business with SBC. Indeed, SBC has, as a general matter, grossly over-billed Telscape. When Telscape disputes SBC's inaccurate bills, resolution of the disputes taken between six and fourteen months. While the disputes are pending, SBC demands payment for disputed bills period, and continues to issue Telscape bills that are inaccurate as a result of inherent SBC billing system defects. Other billing issues have included:

- **UNE-P Deaveraged Loop Costing**

When Telscape began ordering UNE-P lines, SBC charged Telscape "averaged" loop rates, contrary to Telscape's interconnection agreement. Telscape immediately disputed the charges. Only after much delay and SBC confusion was the problem was corroborated; however, it was several more months until SBC finally issued Telscape the billing credit.

- **Port-Back Billing**

SBC had maintained a policy to unilaterally submit port-back orders for end-users returning to SBC and had charged Telscape for the disconnect at the fully manual rate instead of the mechanized rate for which the orders were eligible. Telscape raised the issue in the SBC CLEC user forum, at which time SBC finally decided to reverse their policy. SBC represented to the members of the CLEC user forum that they would automatically credit all CLECs for the improperly billed amounts, however in the final release of the documentation SBC changed the language, and credited only those CLECs that were able to quantify the amount.

- **Late Charges**

SBC continues to bill Telscape for frivolous late charges, and Telscape has repeatedly asked SBC to remove the improper late charges. However, not only does SBC refuse to address the issue, but SBC continues to allow the late charges to accrue and applies new late charges on the unpaid late charges.

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<sup>3</sup> *Verizon Pennsylvania Order*, ¶ 23 (citations omitted).

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- **Incorrect Non Recurring Charges**

SBC incorrectly billed Telscape a “semi-mechanized” rate (\$48.49) for internal migrations from resale or UNE-P to UNE-L instead of the mechanized rate (\$18.72) for which these orders are eligible. After Telscape attempted to escalate this issue for a number of months, SBC finally agreed that the migrations were eligible for the mechanized rate. However, to date, SBC has not credited Telscape for the approximately \$125,000 in overcharges for these orders.

Obviously, then, Pacific’s wholesale billing operations fail to comply with the requirements of checklist item 2. The CPUC’s tepid finding that SBC has complied with this checklist item—stating that Pacific had achieved “a fairly substantial state of parity, which seemed to be improving at year’s end, and we have incentives in place to help assure Pacific does not backslide from the level of vigilance necessary to assure continuing substantial OSS performance parity for CLECs”<sup>4</sup>—crumbles under even cursory examination of most carriers’ day-to-day experience with SBC’s billing operations. Accordingly, the Commission should reject Pacific Bell’s application for failure to satisfy checklist item 2.

**SBC Has Failed to Provide Shared Transport for IntraLATA Toll Calls In Violation of Checklist Item 5**

Transport (dedicated or shared) is an unbundled network element that must be provided on a nondiscriminatory basis pursuant to section 251(c)(3).<sup>5</sup> Pursuant to this checklist item, SBC must demonstrate that it provides transport to a competing carrier under terms and conditions that are equal to the terms and conditions under which the incumbent LEC provisions such elements to itself.<sup>6</sup> SBC has failed to comply with this requirement in that, in violation of checklist Item 5, SBC has consistently refused to facilitate Telscape’s request to carry UNE-P IntraLATA toll calls using shared transport. Indeed, the Commission directly refuted SBC’s assertion that it complies “with the ‘shared transport’ requirements of the Commission’s *UNE Remand Order*”<sup>7</sup> when, on October 9, 2002 the Commission found that SBC “willfully and repeatedly violated” one conditions that the Commission imposed in its order approving the merger application of Ameritech Corp.,<sup>8</sup> which requires SBC to provide CLECs the option of

<sup>4</sup> See *California Decision* at 66.

<sup>5</sup> See 47 U.S.C. § 271(c)(2)(B)(ii) and (v).

<sup>6</sup> *Local Competition First Report and Order* at ¶ 315; see also 47 C.F.R. § 51.313(b).

<sup>7</sup> See SBC Communications Brief in Support of Application by SBC for Provision of In-Region InterLATA Services in California at 68.

<sup>8</sup> *Applications of Ameritech Corp., Transferor, and SBC Communications, Inc., Transferee, For Consent to Transfer Control of Corporations Holding Commission Licenses and Lines Pursuant to Sections 214 and 310(d) of the Communications Act and Parts 5, 22, 24, 25, 63, 90, 95, and 101 of the Commission’s Rules,*

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using shared transport to route intraLATA toll calls, without restriction, between their end user customers and customers served by SBC.<sup>9</sup> As a result, the Commission issued an NAL finding SBC in violation of the *SBC/Ameritech Merger Order*, and finding SBC apparently liable for a forfeiture in the amount of \$6,000,000.

In the *Forfeiture Order*, the Commission explicitly rejected SBC's argument that the paragraph 56 merger conditions does not apply to intraLATA toll traffic, because "SBC's understanding [is] that the Merger Conditions' shared-transport obligation is a purely local one."<sup>10</sup> The Commission concluded that the language of the Act and of the *UNE Remand Order* is "clearly and unambiguously inclusive and does not permit SBC to make exclusions based on the services for which a requesting carrier might use a UNE [including intraLATA toll service]."<sup>11</sup> Clearly, in light of the conclusions set forth in the *Forfeiture Order*, the Commission cannot find that SBC has complied with the requirements of checklist item 5.

**PacBell Has Failed to Demonstrate That Grant of Application is In Public Interest, As Required By Section 271(d)(3)**

Section 271(d)(3)(c) of the Act directs the Commission to reject a 271 application that fails to demonstrate that it is in the public interest, convenience and necessity."<sup>12</sup> Indeed, it is well settled that the public interest, convenience and necessity standard is to be "so construed as to secure for the public the broad aims of the Communications Act."<sup>13</sup> These broad aims include establishing a "pro-competitive, deregulatory national policy framework designed to . . . open[] all telecommunications markets to competition"<sup>14</sup> and making "available . . . to all the people of the United States . . . a rapid, efficient, Nation-wide, and world-wide . . .

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Memorandum Opinion and Order, 14 FCC Rcd 14712 (1999) ("*SBC/Ameritech Merger Order*"), reversed in part on other grounds, *Association of Communications Enterprises v. Commission*, 235 F.3d 662 (D.C. Cir. 2001).

<sup>9</sup> See *In the Matter of SBC Communications, Inc. Apparent Liability for Forfeiture*, File No. EB-01-IH-0030, NAL/Act. No. 2002320800004, FRN 0004-3501-24, 0004-335-71, 00005-1937-01, *Forfeiture Order* (rel. Oct. 9, 2002) ("*Forfeiture Order*").

<sup>10</sup> *Forfeiture Order* at ¶ 15.

<sup>11</sup> *Id.* at ¶ 18.

<sup>12</sup> 47 U.S.C. § 271(d)(3)(c).

<sup>13</sup> *NYNEX Corp., and Bell Atlantic Corp.*, 12 FCC Rcd 19985, ¶ 31 (1997) citing *Western Union Division, Commercial Telegrapher's Union, A.F. of L. v. United States*, 87 F. Supp. 324, 335 (D.D.C. 1949), *aff'd* 338 U.S. 864 (1949); *Washington Utilities and Transportation Commission v. Commission*, 513 F.2d 1142, 1147 (9<sup>th</sup> Cir. 1975); *Commission v. RCA Communications, Inc.*, 346 U.S. 86, 93-95 (1953).

<sup>14</sup> H.R. Rep. No. 104-458 at 1; Telecommunications Act of 1996, Pub. L. No. 104-104 (preamble), 110 Stat. 56 (1996).

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communication service . . . .”<sup>15</sup> As the Commission has recognized, “[t]he legislative history of the public interest requirement in section 271 indicates that Congress intended the Commission, in evaluating section 271 applications, to perform its traditionally broad public interest analysis of whether a proposed action or authorization would further the purposes of the Communications Act.”<sup>16</sup> “[T]he public interest standard necessarily encompasses the goal of promoting competition . . . .”<sup>17</sup> As Commission has correctly recognized, “failure to create competition among local service providers necessarily means a lack of competition to provide interstate switched access,” because “interstate switched access is generally provided over the same ‘bottleneck’ facilities and by the same providers as provide local exchange and exchange access service . . . .”<sup>18</sup> Accordingly, “the public interest analysis necessarily includes a review of the nature and extent of local competition, as exemplified by the fact that Section 271 of the Act specifically applies the public interest standard to, inter alia, a review of local market conditions.”<sup>19</sup>

Accordingly, the public interest standard of Section 271 requires the Commission to look beyond the mere technical compliance with the fourteen point checklist (which, incidentally, the CPUC found Pacific Bell had failed to achieve) and examine whether competition has actually taken root in a state. In California, it is clear that it has not, and this is in large part a result of SBC’s aggressive win-back campaign, of which Telscape has been a target. Specifically, Pacific Bell’s aggressive, and indeed, anticompetitive, marketing and win-back efforts have targeted Telscape’s newly-acquired customers. Telscape has documented numerous instances in which customers are taken by Pacific Bell without any prior notice to Telscape, and in some instances, with no notice at all, resulting in situations where Telscape continues billing the customer even after they have migrated away. Furthermore, Pacific Bell has begun a campaign pursuant to which end-users that disconnect from Pacific Bell are sent a refund check by Pacific Bell. However, where end-users change their service to Telscape, the end users are sent an exit letter from Pacific Bell suggesting they were slammed, and inviting them to call and telling the end user to ask Pacific Bell about special offers to return, and an extra quick return if they were slammed. Telscape submits that these on-going activities not only require that the Commission reject SBC’s application on the grounds that it fails to satisfy the

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<sup>15</sup> 47 U.S.C. § 151 (1997). These goals date to the original Communications Act of 1934. See H.R. Rep. No. 1918, 73d Cong., 2d Sess. 1 (1934).

<sup>16</sup> *Ameritech Michigan Order* at ¶ 385, citing S. Rep. No. 23, 104<sup>th</sup> Cong., 1<sup>st</sup> Sess. 44 (1995) (“The public interest, convenience and necessity standard is the bedrock of the 1934 Act, and the Committee does not change that underlying premise through the amendments contained in this bill.”).

<sup>17</sup> *NYNEX Corp., and Bell Atlantic Corp.*, 12 FCC Rcd 19985, ¶ 31 (1997).

<sup>18</sup> *Id.*

<sup>19</sup> *Id.* at ¶35.



Ms. Marlene Dortch, Secretary

October 18, 2002

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public interest test of Section 271, but the Commission should also find that SBC has violated Section 222 of the Act.

In 1996, Congress amended the Act to include section 222(b), which limits a telecommunication carrier's use of proprietary information in its marketing activities. Specifically, section 222(b) prohibits a telecommunications carrier that receives or obtains proprietary information from another carrier for purposes of providing any telecommunications service from using such information for its own marketing efforts.<sup>20</sup> Section 222(b) restricts carriers' use of such proprietary information to the provision of telecommunications service to other carriers.<sup>21</sup> In addition, the Commission has determined that carrier change information is carrier proprietary information subject to Section 222.<sup>22</sup> The Commission has interpreted section 222(b) to prohibit carriers from using carrier change information to attempt to change or unduly influence a subscriber's decision to switch to carriers,<sup>23</sup> and the Commission has concluded that carriers may not use customer proprietary network information ("CPNI") or carrier proprietary information to retain existing customers, where the carrier obtained notice of a customer's imminent cancellation of service through the provision of wholesale carrier-to-carrier service.<sup>24</sup>

Despite the mandates contained in the Act and the Commission's orders adopted there under, Pacific Bell continues to engage in anti-competitive marketing activities directed against Telscape, using carrier proprietary information. Pacific Bell's improper marketing

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<sup>20</sup> 47 U.S.C. § 222(b).

<sup>21</sup> *Id.*

<sup>22</sup> *Implementation of the Subscriber Carrier Selection Changes Provisions of the Telecommunications Act of 1996, Policies and Rules Concerning Unauthorized Changes of Consumers' Long Distance Carriers*, Second Report and Order and Further Notice of Proposed Rulemaking, CC Docket No. 94-129, Commission 98-334, 14 FCC Rcd 1508, 1572, ¶106 (1998) ("Slamming Order").

<sup>23</sup> *Id.*

<sup>24</sup> *See In the Matter of Implementation of the Telecommunications Act of 1996, Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information*, Order on Reconsideration and Petition for Forbearance, CC Docket Nos. 96-115 and 96-149, 14 FCC Rcd 14409, 14449 at ¶ 77 (1999) ("CPNI Order on Reconsideration"); *see also In the Matter of Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information*, CC Docket Nos. 96-115 and 96-149, Commission 98-27, Second Report and Order and Further Notice of Proposed Rulemaking, 13 FCC Rcd 8061, (1998) ("CPNI Order"). We note that the United States Court of Appeals for the 10<sup>th</sup> Circuit, *US WEST v. Commission*, 182 F.3d 1224 (10<sup>th</sup> Cir. 1999), *cert. denied*, 120 S.Ct. 2215 (Jun. 5, 2000) (No. 99-1427) (*US WEST v. Commission*), issued an opinion vacating a portion of the Commission's 1998 CPNI Order and the Reconsideration Order. *See also In the Matter of Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information*, Clarification Order and Second Further Notice of Proposed Rulemaking, CC Docket No 96-115, Commission 01-247, at ¶¶ 1-8 (rel. September 7, 2001) (*CPNI Clarification Order*).

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practices are targeted at newly contracted Telscape customers who have not yet ceased receiving Pacific Bell or another carrier's service and commenced receiving service from Telscape.

Telscape submits that Pacific Bell's win-back activities are contrary to the requirements of section 222(b) of the Act and the Commission's *Slamming* and *CPNI Remand Orders*. SBC has a track record of engaging in such behavior. Accordingly, other state commission's, including most notably, Texas, have restricted, or are considering restricting the ability of SBC to engage in win-back activities. Indeed, the Texas Commission is on the cusp of adopting rules which would prohibit incumbents in the state of Texas from making retention and win-back offers directly to soon-to-be-former customers and former customers for a specified number days after the customer decides to change carriers.<sup>25</sup> Similarly, the Ohio Public Utilities Commission adopted an order preventing SBC Ameritech from engaging in win back activities,<sup>26</sup> as did the Illinois Commerce Commission.<sup>27</sup> As these cases show, SBC has clearly engaged in a demonstrable pattern of anticompetitive behavior.

The size and scale of SBC puts all competitive carriers at a disadvantage when it comes to marketing and customer win-back efforts. With SBC/PacBell controlling 94% of the phone lines in their California region, a 2% gain of market share would equate to a 30% reduction in CLEC market share. This would also mean that if SBC earmarked 2% of revenue for win-back efforts, SBC would have a war chest that no competitive carrier could match, putting the CLEC community at a significant disadvantage. There is evidence that this is exactly what is this happening. Therefore, Telscape has urged the California Commission to immediately open a rulemaking to address the specific and pervasive problem of Pacific Bell's anticompetitive win-back activities, which, unless addressed by the Commission now, will continue to leave California's telecommunications consumers with little or no competitive choice.

The Commission is now faced with a record which demonstrates a pattern of SBC impeding competitors through pervasive billing costs, raising CLEC costs by refusing to provision shared transport, in violation of the Act and the conditions governing SBC's merger with Ameritech, and engaging in anticompetitive win back activities. At the end of the day, the Commission must conclude that it cannot grant SBC's 271 application on the grounds that it has

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<sup>25</sup> See *Rulemaking to Amend R. § 26.226 to Address Winback/Retention Offers by Chapter 58 Electing Companies Project*, Texas Public Utilities Commission Project 25784. The Texas Commission voted last week to publish the proposed rule, which triggers a 30-day comment cycle. Replies will be due 45 days after the initial comment deadline, and staff has proposed holding a Dec. 4 hearing on the matter.

<sup>26</sup> See *In the Matter of the Complaint of CoreComm Newco, Inc., v. Ameritech Ohio*, Case No. 02-579-TP-CSS, Public Utilities Commission of Ohio (April 11, 2002).

<sup>27</sup> See *Z-Tel Communications, Inc. v. Illinois Bell Tel. Company*, Case 02-0160, Order, Illinois Commerce Commission (May 8, 2002).

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failed to comply with at least four of the checklist items, as well as the public interest standard of the Act, and therefore should be denied.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Ross A. Buntrock", written in a cursive style.

Ross A. Buntrock

cc: Renee Crittendon, WCB  
Susan Wittenberg, DOJ  
Brianne Kucerik, DOJ  
Qualex International



September 10, 2002

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*¡Llame al 1-888-781-9911 hoy!*

Dear

We were recently notified that your local telephone service was disconnected from SBC Pacific Bell Telephone Company.

If this action has been taken without your knowledge or consent, please contact us immediately at **1-888-781-9911** and an SBC Pacific Bell representative will quickly re-connect your telephone service with us.

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**Your Business is Important to Us.**

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Jill Fields  
Manager Consumer Services  
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10474

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